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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. ~~1083~~ 60

C. J. HENDRY COMPANY AND FRANK SEMATOVICH,
Appellants,

vs.

E. C. MOORE, I. ZELLERBACH AND A. T. JERGENS, AS THE FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

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Counsel for Appellants.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

L. A. No. 16192

E. C. MOORE, I. ZELLERBACH, A. T. JERGENS, AS THE FISH AND GAME COMMISSION OF THE STATE OF CALIFORNIA,
Petitioners and Appellees,

vs.

PURSE SEINE NET, APPROXIMATELY 325 FATHOMS LONG, 32 FATHOMS DEEP, APPROXIMATE SIZE OF MESH FIVE TO EIGHT INCHES,
Respondent,

C. J. HENDRY COMPANY, A CORPORATION, AND FRANK SEMATOVICH,
Claimants and Appellants.

STATEMENT OF BASIS OF APPELLATE JURISDICTION IN UNITED STATES SUPREME COURT.
(Supreme Court Rule 12.)

I.

Statutory Provisions Believed to Sustain the Appellate Jurisdiction of the United States Supreme Court.

The appellants believe the jurisdiction of the United States Supreme Court to review this cause is primarily sustained by Judicial Code Section 237-a, being Section 344-a

of Title 28, United States Code, which provides that the Supreme Court may review, by writ of error, a final judgment of the highest court of a State in which a decision in the suit could be had—"Where there is drawn into question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity".

The appellants believe also the jurisdiction to review this cause is sustained by Subdivisions (b) and (c) of Section 237 of the Judicial Code, the former providing that it shall be competent for the Supreme Court to review by certiorari such final judgment, where there is drawn into question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where a right or immunity is specially set up or claimed by a party under the Constitution or Statutes of the United States, and the latter providing that if a writ of error be improvidently sought and allowed in a case where the proper mode of seeking review is by petition for certiorari, the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari.

The appellants also refer to the provisions of Sections 861-(a) and 861-(b) of Title 28 of the United States Code abolishing writs of error, substituting appeals therefor, and providing that the statutes regulating the right to a writ of error shall be applicable to the appeal substituted therefor.

II.

The State Statute Challenged and the Federal Enactment Affecting It.

Involved in this case is the validity of the remedial aspects of Section 845 of the Fish and Game Code of the

State of California as construed and applied herein. The text of the statute is:

> "*Seizure and sale of nets.* Any net used for taking fish in violation of the provisions of this chapter is a public nuisance. It is the duty of every person authorized to make an arrest for the violation of any provision of this code to seize and keep such net and report such seizure to the commission. The commission must commence proceedings in the Superior Court of the county or city and county in which the seizure is made by petitioning said court for a judgment forfeiting such net. Upon the filing of such petition, the clerk of said court shall fix a time for the hearing thereof and cause notices to be posted for fourteen days in at least three public places in the town, city, or city and county, where the court is held, setting forth the substance of such petition and the time and place fixed for the hearing. At such time the court must hear and determine said proceeding, and upon proof that such net was used in violation of this chapter must order the same forfeited. Any net so forfeited shall be sold or destroyed by the commission. The proceeds from all such sales shall be paid into the State Treasury to the credit of the fish and game preservation fund."

The State statute, as construed and applied herein, is claimed to be repugnant to Article III, Section 2, of the Constitution of the United States, providing that the judicial power of the United States shall extend to • • • "All cases of admiralty and maritime jurisdiction", and to those parts of Sections 24 and 256 of the Judicial Code of the United States as follows:

> "Section 24. The District Courts shall have original jurisdiction as follows:
>
> Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is com-

petent to give it. * * *" *(Sec. 41 (3) of Title 28, U. S. Code).*

"Section 256. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several states:

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it. * * *" *(Sec. 371 (3) of Title 28, U. S. Code).*

The appellants claim the State statute is repugnant to the Federal, constitutional and statutory provisions above quoted in that, as construed and applied herein, it purports to authorize a State court to proceed *in rem* in a cause of seizure and forfeiture of a thing maritime, following a seizure thereof on navigable waters, which necessarily involves the exercise of admiralty jurisdiction and the granting or withholding of an admiralty remedy—not a common law remedy, which alone is "saved to suitors" by the saving clauses in the acts of Congress above referred to.

III.

Dates of Entry of Judgment and of Application for Appeal.

The judgment appealed from was rendered and entered on October 20, 1941. A petition for rehearing was denied on November 18, 1941 and the remittitur to the trial court was issued November 21, 1941 (R. 198-9).

The application for this appeal was presented for allowance to the Chief Justice of the Supreme Court of California on January 19th, 1942 (R. 81).

The Supreme Court of the State of California is the highest court of the State in which a decision in the suit could be had. (Constitution of California, Art. VI, Sec. 2; 4.)

IV.

Nature of the Case.

A. Facts.

Certain waters of the Pacific Ocean adjacent to Catalina Island, Los Angeles County, California, within the territorial jurisdiction of the State, constitute Fish and Game District No. 20 (Fish and Game Code, Sec. 89), and in that district the taking of fish by net is unlawful (Fish and Game Code, Sec. 842). The fishing boat "Reliance" was a diesel powered purse seiner about 70 feet long (R. 11), and on June 18, 1936 she was equipped with a purse seine net (respondent herein) which was approximately 325 fathoms long and 32 fathoms deep, which was used by her in performing her function of fishing (R. 138).

On said day the vessel was boarded by State enforcement officers in the Pacific Ocean north of Catalina Island, and within Fish and Game District No. 20. Her net had been pursed, was partially aboard the vessel and partially in the water, and contained a quantity of blue fin tuna. An enforcement officer placed the master and crew under arrest, seized and tagged the net, and thereafter the net was carried to Los Angeles, where it was delivered to the Fish and Game Commission (R. 135-42). Thereafter the commissioners commenced this proceeding pursuant to Section 845 of the Fish and Game Code.

B. Proceedings Whereby the Federal Question Was Raised and Determined.

On June 24, 1936 the Fish and Game Commissioners filed in the Superior Court of the State of California, in and for the County of Los Angeles, the petition herein, alleging in substance that on June 18, 1936, in State waters within Fish and Game District No. 20, the respondent net was un-

lawfully used by one Jack Borich and other parties in violation of Section 842 of the Fish and Game Code; that a duly appointed enforcement officer then and there seized the net; that the same was a public nuisance; and praying the net be adjudged forfeited and ordered to be destroyed or sold (R. 99). In accordance with the directions of the statute (Sec. 845), a time for hearing was fixed by the clerk of the court (R. 117), and the statutory notices were timely and properly posted (R. 119-124).

Prior to the day set for hearing the appellants herein filed their claim as owners of the net (R. 121), and their demurrer to the petition upon the grounds (among others) that the petition failed to state facts sufficient to constitute a cause of action within the jurisdiction of the court, and that the court had no jurisdiction of the respondent net or of the subject of the action (R. 107), and their answer (R. 104). At the hearing, evidence of the facts above recited was given, decision on the issues of law raised by the demurrer was reserved, and after the issues of law and fact had been elaborately briefed and argued, the trial court gave its judgment, adjudging the net to be forfeited to the State of California (R. 113).

On the demurrer and final argument the appellants challenged the procedural aspects of Section 845 of the Fish and Game Code as invalid and repugnant to the provisions of the Constitution of the United States and acts of Congress above referred to, in that the statute purported to confer jurisdiction in the Superior Court to adjudge forfeiture of a thing maritime, part of the equipment of a vessel, and seized upon the navigable waters of the United States in a proceeding strictly *in rem;* and that the remedy purported to be afforded by Section 845 is an admiralty remedy and not a common law remedy which was saved to suitors in the saving clauses of the acts of Congress conferring exclusive jurisdiction in causes of admiralty and maritime

cognizance in the District Courts of the United States. The trial court rejected these contentions in a written opinion ante-dating the formal judgment, a copy of which is appended to this statement and marked "D".

A motion for a new trial was timely made by the appellants and denied by the trial court (R. 184-6).

The appellants duly appealed to the District Court of Appeal for the Second Appellate District (R. 126). The cause was thereafter transferred by that court to the Supreme Court (R. 190), and by the Supreme Court transferred for hearing and determination to the District Court of Appeal for the First Appellate District (R. 191).

The practice of raising questions for review on appeal by assignments of error does not prevail in California, the question involved in the appeal being required by the rules governing appellate courts to be set forth on the first page of the appellants' opening brief. (Rules of the Judicial Council for the Supreme and District Courts of Appeal, Rule 8, Section 2).

The Federal question presented on the appeal was stated in the appellants' opening brief as follows:

> "Does the Superior Court of the State of California have jurisdiction under Section 845 of the Fish and Game Code to entertain a proceeding *in rem*, commenced by the Fish and Game Commissioners, for the forfeiture of a fishing net seized by a game warden on board the vessel to which it belongs, in the navigable waters of the Pacific Ocean, within three miles of the state coast line?" (R. 192).

The District Court of Appeal determined the question in the affirmative, and rendered its opinion and judgment holding that the proceeding was within the jurisdiction of the Superior Court and was not within the exclusive jurisdic-

tion of the United States Courts. A copy of the opinion of the District Court of Appeal is appended to this statement and marked "C".

Before the judgment of the District Court of Appeal had become final, the appellants petitioned to the Supreme Court of the State of California for a hearing in that court, raising only the Federal question. The petition was granted and the cause transferred to the Supreme Court for hearing and determination (R. 194). After hearing, the Supreme Court rendered a judgment sustaining the contentions of the appellants, holding that the cause of action was of admiralty cognizance and, as a proceeding *in rem*, was exclusively within the original jurisdiction of the United States District Courts, and directing that the cause be remanded with instructions to dismiss the proceeding. A copy of the opinion upon which this judgment was based is appended hereto and marked "B".

Thereafter the appellees petitioned the Supreme Court for a rehearing, which was granted (R. 196), and after reargument and the filing of further briefs, the Supreme Court rendered its judgment, which is here sought to be reviewed, holding that the proceeding and remedy contemplated by Section 845 of the Fish and Game Code was a "traditional common law remedy", and as such within the saving clause of the acts of Congress. The judgment of the trial court was affirmed. A copy of the opinion on which the latter judgment is based is appended to this statement and marked "A".

A petition by the appellants for a further rehearing was denied (R. 198), and the last mentioned judgment of the Supreme Court became final.

That the Federal question was expressly raised in each of the above recited proceedings and expressly decided by the trial court, the intermediate appellate court and the

Supreme Court fully appears from each of the several opinions appended hereto.

As the challenge struck at the jurisdiction of the State court over the very subject matter of the petition, it follows that the Federal question was necessarily decided, and the jurisdiction could not have been sustained upon any adequate non-Federal ground.

V.

Basis of Appellate Jurisdiction in the Supreme Court of the United States.

Succinctly stated, the State statute, as applied herein, has been challenged as purporting to confer admiralty jurisdiction on a State court and to empower the State court to administer an admiralty remedy in a maritime cause of action. As jurisdiction in admiralty and the administration of remedies peculiarly of admiralty cognizance are conferred exclusively on the Federal courts by the paramount Federal law, it is obvious that the decision of the highest State court of jurisdiction upholding the validity of the statute so applied, as against the exclusive Federal grant, presents squarely a case within the literal terms of Judicial Code Section 237-(a). So applied, the State statute is palpably repugnant to the Federal enactments, unless the remedy authorized by the statute and administered in the State court can be brought within the exception of "a common law remedy where the common law is competent to give it", which is saved to suitors by the sections of the Judicial Code hereinabove referred to.

The cause of action herein is unmistakably civil and maritime, for it was a proceeding for forfeiture based upon seizure on navigable waters of a thing maritime,—part of the essential equipment of a fishing vessel. The Supreme Court of California so held in its final opinion herein, and

the correctness of that holding is confirmed by many decisions of the United States Supreme Court. See:

The Confiscation Cases, 7 Wall. 454, 19 L. Ed. 196;
The Sarah, 8 Wheat. 391, 5 L. Ed. 644;
United States v. *LaVengeance*, 3 Dall. 297, 1 L. Ed. 610.

The proceeding contemplated by Section 845 of the Fish and Game Code and taken herein is a proceeding *in rem*, the prototype of which is the conventional suit *in rem* according to the course of the United States courts in admiralty. It is one essentially against the *res* itself as the debtor or offending thing, in which the *res* itself is seized and impleaded as the defendant, and is judged and sentenced accordingly. The statutory plan is that by virtue of dominion over the thing, all persons interested in it are deemed to be parties to the Superior Court proceeding. The decree purports to bind all the world, and under it the title and interests of all persons are affected, not merely the title or interest of a personal defendant. The proceeding meets all the tests of a proceeding *in rem* announced by the United States Supreme Court in:

Rounds v. *Cloverport Foundry & Machine Co.*, 237 U. S. 303, 35 Sup. Ct. 596.

Each of the State courts which has passed upon this cause has held expressly or by necessary implication that the proceeding was strictly *in rem*, and the appellees have never suggested otherwise.

The validity of State statutes purporting to vest jurisdiction *in rem* in admiralty causes in the tribunals of a State has frequently been challenged by suitors on the grounds of repugnancy to the exclusive grant of admiralty jurisdiction in the United States courts, and the Supreme Court of the United States has not hesitated to exercise its jurisdiction on writ of error or appeal to review judg-

ments of the highest State courts of jurisdiction upholding the State statute so applied. In those cases the essential question for determination has been,—Can the remedy provided by the State statute be justified as a common law remedy within the meaning of the saving clauses?

The following cases are believed to sustain the jurisdiction on appeal of the Supreme Court of the United States as to this cause:

The Moses Taylor, 4 Wall. 411, 18 L. Ed. 397.
The Ad. Hine, 4 Wall. 555, 18 L. Ed. 451.
The Glide, 167 U. S. 606, 17 Sup. Ct. 930.

In the above cases the precise question here involved was reviewed by the Supreme Court on writ of error to the highest State court of jurisdiction. The proceedings *in rem* purportedly authorized by State statutes were examined in the light of the saving clauses, and the statutes, to the extent that they purported to authorize the exercise of jurisdiction *in rem* in maritime causes, were held invalid.

More recently the Supreme Court has exercised its jurisdiction by writ of error to review the validity of a State industrial accident law as applied to maritime causes and as vesting original jurisdiction in the State Industrial Accident Commission.

Southern Pacific Co. v. *Jensen*, 244 U. S. 205, 37 Sup. Ct. 524.

The right of review by appeal in the Supreme Court of the United States is not impaired by the possibility that Section 845 of the Fish and Game Code may have certain valid aspects. It is not disputed that the statute is valid in its substantive aspects, for it is unquestioned that a State has power to regulate fishing in its territorial waters. (*Manchester* v. *Massachusetts*, 139 U. S. 240, 11 Sup. Ct. 559-65). No doubt that power includes the power to declare forfeited or subject to forfeiture, property, maritime

and non-maritime, used in violation of its regulations; and in non-maritime causes, such as seizures on land, the procedural aspects of the statute do not run counter to the exclusive Federal grant of jurisdiction in admiralty causes.

But when the statute is resorted to, to justify the proceedings taken in a cause palpably maritime, the paramount Federal statutes come into play, and unless the statutory scheme can be justified under the saving clauses, the State statute "as construed and applied" is invalid.

A statute may be invalid as applied to one state of facts and yet valid as applied to another, and a litigant can be heard to question the statute's validity only when and so far as it is applied to his disadvantage.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 42 Sup. Ct. 106.

The case last cited is square authority supporting the appellate jurisdiction of the United States Supreme Court in this cause.

Counsel for appellants have made exhaustive study of the proper method of seeking this review, and upon the authorities above cited are convinced that the proper method is by appeal under Judicial Code Section 237-(a). But if any doubt should exist as to the right of review by appeal, there can be no doubt that the case is one which it is competent for the United States Supreme Court to review by writ of certiorari. The substance and importance of the question involved are sufficiently shown in the following subdivision, and if it should be held that review by appeal has been improvidently sought, it is respectfully urged that a review by certiorari should be granted under the provisions of Judicial Code Section 237-(c).

VI.

The Question Involved Is Substantial.

That the Federal question involved has substance is demonstrated by the evident difficulty which the Supreme Court of California had with it. The cause was twice heard by that court in bank, and the conclusion reached on the final hearing was directly opposite to that reached on the first hearing. It is interesting to note that each opinion received the concurrence of only four justices, the minimum number required for a judgment. There were several changes on the court between the hearings, and only one justice (the present Chief Justice) concurred in both judgments.

The final decision on the question is novel and revolutionary, for it directly holds that the proceeding *in rem* prescribed by the State statute is a "traditional common law remedy" and as such cognizable by State courts under the saving clauses (R. 41).

The soundness of that holding is the essence of the assignments of error herein, for in all other respects the Supreme Court, in both of its opinions, has held in accordance with the contentions of the appellants. Thus, it has recognized and held, expressly or by necessary implication, (1) that the cause of action was maritime; (2) that the proceedings taken under the statutory authority were proceedings *in rem;* and (3) that to escape the Federal ban upon the State court's jurisdiction, the remedy had to be a common law remedy which the common law was competent to give. Upon those premises the court held that the proceeding under Section 845 was a type of action cognizable in the common law courts of England at the time of the separation of the American colonies, and therefore was a common law remedy saved under the saving clauses.

This holding is startling when it is pointed out that in 1866 the Supreme Court of the United States held in *The Moses Taylor*, 4 Wall. 411; 18 L. Ed. 397, that a proceeding *in rem* was not a common law remedy but a civil law remedy, and was not within the contemplation of the saving clauses. That holding was unqualified and apparently left no room for an exception as to any sort of maritime cause,—contract, tort, petitory or possessory, penalty or forfeiture. The principle was reaffirmed or restated in a long line of cases involving maritime and non-maritime causes, so that for many years one of the fundamental tenets of the admiralty practitioner has been, "A state court cannot proceed *in rem* in a maritime cause".

The Ad. Hine, 4 Wall. 555; 18 L. Ed. 451.

The Glide, 167 U. S. 606; 17 S. Ct. 930.

Knapp-Stout & Co. v. *McCaffrey*, 177 U. S. 638; 20 S. Ct. 824-6.

Rounds v. *Cloverport Foundry & Machine Co.*, 237 U. S. 303; 35 S. Ct. 596.

Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109-123; 44 S. Ct. 274-277.

The federal courts have been liberal in their construction of the saving clauses, but have rigidly held to the essential limitation that the clauses do not extend to remedies borrowed from a legal system other than the common law or novel remedies evolved to meet changing social conditions, such as the workmen's compensation scheme.

As was said by the Supreme Court in *The Moses Taylor, supra:*

> "It is not a remedy in the common law courts which is saved, but a common law remedy. A proceeding *in rem*, as used in the admiralty court, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute."

The scope and limitations of the saving clauses, as construed by the Supreme Court of the United States, was stated by Mr. Justice Brandeis in one of the most recent pronouncements as follows:

> "The 'right of a common-law remedy,', so saved to suitors, does not, as has been held in cases which presently will be mentioned, include attempted changes by the states in the substantive admiralty law, but it does include all means *other than proceedings in admiralty* which may be employed to enforce the right or to redress the injury involved. It includes remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. (Citing cases). *A state may not provide a remedy in rem for any cause of action within the admiralty jurisdiction.* (Citing cases). But otherwise the State, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit." (Italics supplied).
>
> *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109-123; 44 S. Ct. 274-7.

The final judgment herein, in the California Supreme Court, is, we believe, the first time that an appellate court, state or federal, has *consciously* made an adjudication to the effect that there is an exception to *The Moses Taylor* rule in causes of maritime forfeitures. If that exception is valid, it necessarily follows that in forfeiture cases under state laws, any state is free to authorize its courts to proceed *in rem* against a vessel or any part of her equipment, from the net or tackle of an insignificant fishing craft to the entire structure and appurtenances of the largest vessel afloat, and divest the title of all interests therein, be the holders innocent or guilty.

It is submitted that such a concept is revolutionary, and it is of manifest public importance that the existence or

non-existence of any such qualification on *The Moses Taylor* rule should be determined by the highest judicial authority.

It is submitted that the state Supreme Court seriously erred in holding the statutory remedy to be traditionally of common law cognizance. The following points, which the appellants will urge for reversal of the judgment, are suggested:

1. Because in 1660 or earlier, the Parliament of England enacted statutes providing for a type of forfeiture different from the conventional common law forfeiture (which followed conviction or attainder of a person), the Supreme Court has assumed that all remedies which might have been available to enforce or vindicate rights under those statutes became remedies cognizable at common law. It has overlooked that the law of England was not exclusively common law. Included therein was a great jurisprudence based on the civil law, written and unwritten, administered in the ecclesiastical courts, the admiralty courts and on the revenue side of the court of the exchequer by processes and remedies unknown to the common law, and which the judges of the common law courts were prone to view with abhorrence.

2. Such a remedy was the proceeding *in rem*. It was and is entirely foreign to any concepts of common law jurisdiction, and was strictly a civil law remedy, administered only in the courts of civil law jurisdiction,—the admiralty and the revenue side of the exchequer.

The Palmyra, 12 Wheat. 1; 6 L. Ed. 531-5.
The Moses Taylor, supra.

3. The vindication of rights under the statutory forfeitures provided in the Seventeenth Century Navigation Acts, such as *12 Car. II, Ch. 18*, was evidently cognizable in any jurisdiction in England where a remedy appropriate to the particular circumstances was available, but always

within the limitations of the jurisdiction selected and by the process which the courts of such jurisdiction were capable of affording. By the statute of *12 Car. II*, captors and informers are authorized to sue for their interests "*in any court of record* by bill, information, plaint or other action." There is also an express provision for condemnation in admiralty (the admiralty court was not recognized as a court of record), following a seizure by a naval commander. A proceeding by bill or plaint connotes a remedy at common law or equity; an information connotes a proceeding in a court administering civil law, and no doubt referred to the informations on the revenue side of the exchequer courts referred to by Judge Story in *The Palmyra, supra.* It is evident that the statute was designed to make available to the suitor an election of remedies according to the common law practice or that of the civil law, as he might deem most appropriate.

4. The cases construing he statute, cited in the opinion of the Supreme Court, do not sustain the view that the statutes created or sanctioned a proceeding *in rem* in common law causes. On the contrary, both cases are conventional common law actions against personal defendants. *Roberts* v. *Withered*, 5 Mod. 193; 12 Mod. 92, was a simple action in detinue, whereby an informer sought to recover from a defendant in possession the property alleged to have been forfeited. *Wilkins* v. *Despard*, 5 Durnf. & East's Rep. 112 was an action in trespass by the owner of forfeited property against a captor in possession. Nothing remotely akin to a proceeding *in rem* was anywhere involved.

5. The California Supreme Court has failed to distinguish between matters of substance and matters of remedy. No doubt the Navigation Acts did provide for a new type of forfeiture,—one which became effective as to the passage of title by operation of law upon the commission of the

offense. That is the substantive aspect. Its remedial aspect is simply the pointing out of various proceedings in courts administering the civil law and others administering the common law, but it did not purport to enlarge or detract from the conventional remedial jurisdiction of any system or court. Thus, if a suitor could vindicate his right under the statute by a personal judgment against a defendant within reach of process, a common law action of replevin, detinue or trespass was appropriate. If it was necessary to vindicate the right by a seizure, condemnation and sale, the only adequate remedy was the proceeding *in rem* cognizable exclusively in the admiralty or the exchequer.

6. The saving clauses in the acts of Congress defining the admiralty jurisdiction do not purport to save a remedy "according to the laws of England". That would include civil as well as common law remedies. They save only common law remedies.

7. Statutory forfeitures have been common in England for centuries, and in the United States and the several states since the foundation of the republic. Since the Judicature Act in England and at all times in American jurisdictions, practically all remedies are administered by courts of general jurisdiction, which also administer the common law. Many of these statutes specifically authorize proceedings *in rem* in such courts to enforce or vindicate the forfeiture. But that does not change the essential character of a remedy *in rem* from a civil law remedy to a common law remedy. It is not a remedy in courts of general jurisdiction or in common law courts which was saved, but a *common law remedy*.

The Moses Taylor, supra.

8. Since 1789 original jurisdiction of all causes of seizure and forfeiture under the laws of the United States, mari-

time or non-maritime, has been vested in the district courts, which sit as courts of admiralty, equity and common law. The essential test of admiralty jurisdiction in forfeiture cases is whether the seizure took place on land or on navigable waters. If, as has been held herein, a proceeding *in rem* for forfeiture is a traditional common law remedy, it is obviously immaterial where the seizure took place, for all seizures for forfeiture would be of common law cognizance and the remedy a common law remedy, in which causes suitors are guaranteed a right of trial by jury by the federal Constitution. Yet the United States Supreme Court has held time and again that if the seizure is on the navigable waters, the cause is of admiralty cognizance, triable only on the admiralty side of the district courts, and that in such causes (unlike causes based on land seizures) the right of trial by jury does not inhere.

The Confiscation Cases, 7 Wall. 454, 19 L. Ed. 196;
Armstrong's Foundry v. *United States*, 6 Wall. 766, 18 L. Ed. 882;
The Sarah, 8 Wheat. 391, 5 L. Ed. 644;
The Betsy and Charlotte, 4 Cranch. 443, 2 L. Ed. 673;
United States v. *LaVengeance*, 3 Dall. 297, 1 L. Ed. 610.

It is submitted, the question presented in this appeal has substance and the appeal has merit.

Respectfully submitted,

ALFRED T. CLUFF,
ARCH E. EKDALE,
Attorneys for Appellants, C. J. Hendry Company, a Corporation, and Frank Sematovich.

APPENDIX "A".

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

In Bank.

L. A. 16192.

Filed Oct. 20, 1941.

E. C. Moore, I. Zellerbach, A. T. Jerdens, as the Fish and Game Commission of the State of California, *Petitioners and Appellees,*

vs.

Purse Seine Net, Approximately 325 Fathoms Long, 32 Fathoms Deep; Approximate Size of Mesh Five to Eight Inches, *Respondent;*

C. J. Hendry Company, a Corporation, and Frank Sematovich, *Claimants and Appellants.*

California law enforcement officers seized a large purse seine fishing net in use on the fishing boat "Reliance" in navigable waters of the Pacific Ocean adjacent to Catalina Island. The taking of fish by net within these waters is unlawful. (Fish and Game Code, sec. 842). The California Fish and Game Commission filed a petition in the Superior Court asking for a judgment to declare the net a public nuisance forfeited to the State, and to order its destruction or sale under the provisions of section 845 of the Fish and Game Code. A judgment of forfeiture issued from which the owners of the net have appealed. They do not challenge the power of the state to enact legislation regulating fishing within territorial waters and providing for the forfeiture of nets used in an illegal manner, but they contend that the state court has no jurisdiction to proceed in the action because it is a maritime cause of action within the exclusive admiralty jurisdiction of the federal courts.

Section 9 of the Judiciary Act of 1789 and later statutes re-enacting the same provision (Judicial Code, secs. 24 (2),

636; 28 U. S. C. A. 41, subd. 3, 371) provide that the federal district courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, "saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it." (See The Moses Taylor, 4 Wall. 411). The present proceeding involves a maritime cause of action. If the property proceeded against if an integral part of the vessel or its equipment and is seized on navigable waters the cause is maritime. (Turner v. U. S., 27 Fed. (2d) 134; The Buffalo, 148 Fed. 331; The Witch Queen, 30 Fed. Cas. 396.) This fact alone, however, does not establish that the action is within the exclusive jurisdiction of the federal courts. The saving clause of the Judiciary Act makes it clear that a case involving a maritime cause of action may properly be brought in a state court if the type of remedy pursued is traditionally within the jurisdiction of the common law courts. Even though the right to sue is created by a recently enacted state statute, it is within the saving clause so long as the remedy is of a type recognized at common law (Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109), including equity. (Knapp-Stout & Co. v. McCaffrey, 177 U. S. 638).

If the action is of a type that was cognizable in both admiralty and common law courts the state courts retain a concurrent jurisdiction with the Federal admiralty courts to entertain the action. (Reynolds v. Steamboat Favorite, 10 Minn. 100, 193; N. J. Steam Nav. Co. v. Merchant's Bank, 6 How. 344, 390; Percival v. Hickey, 18 Johns (N. Y.) 257; 1 Kent Com. 367, 377; 1 Story, Constitution, 533. See Am. Steamboat Co. v. Chase, 16 Wall. 522; Sherlock v. Alling, 93 U. S. 99; Fisher v. Boutville Trans. & Towing Co., 162 Fed. 904; International Nav. Co. v. Lindstrom, 123 Fed. 475; The Harrisburg, 119 U. S. 213; The Hamilton, 207 U. S. 398; Aurora Shipping Co. v. Boyce, 191 Fed. 966.) "The saving clause of the Judiciary Act and of the Judicial Code does not contemplate admiralty remedies in a common law court. Its meaning is that in cases of concurrent jurisdiction in admiralty and at common law, the jurisdiction in the latter is not taken away." (Benedict, Admiralty (5th ed.) sec. 23. See Knapp-Stout & Co. v. McCaffrey, supra; Red

Cross Line *v.* Atlantic Fruit Co., supra.) The fact that federal forfeiture statutes, similar to that of California, require that a proceeding thereunder against a vessel or its equipment be brought in a federal district court sitting as a court of admiralty (See The Sarah, 8 Wheat. 391; U. S. *v.* The Betsy and Charlotte, 4 Cranch 433; The Confiscation Cases, 7 Wall. 454; U. S. *v.* La Vengeance, 3 Hall 297; U. S. *v.* Grundy, 3 Cranch 337; The Palmyra, 12 Wheat. 1) does not prevent California from conferring jurisdiction upon her courts to proceed with such cases under a California statute if the type of action is a traditional common law remedy.

It is therefore necessary to determine whether this forfeiture proceeding by the state is the type of action which was cognizable in a common law court. In 1789 when the Judiciary Act was enacted there had been little development of the common law in federal or state courts of the United States. An examination of the English common law as it existed before that time must therefore be made.

In determining the jurisdiction of the English common law courts, acts of Parliament defining that jurisdiction must be taken into account. It is well established in California that the common law of England includes not only the *lex non scripta* but also the written statutes enacted by Parliament. (Martin *v.* Superior Court, 176 Cal. 289; People *v.* Richardson, 138 Cal. App. 404). Other jurisdictions are in accord with this view, most of them holding that English statutes enacted prior to the time of separation of the colonies from the Mother Country in 1776 are included within the English common law. (See cases cited in 78 U. of Pa. L. Rev. 195; 11 Am. Jur. 166; 22 L. R. A. 508, et seq.)

Appellants' contention that the present proceeding is of a type unknown to the common law courts because it is an action in rem against the net itself rather than in personam against the owners of the net is unsound. While it is true that actions in common law courts are usually in personam as contrasted to the in rem proceedings of the courts of the Admiralty, it has long been established that an action in rem can be brought by the State in an ordinary common law court for the forfeiture of goods or articles used in viola-

tion of laws imposing such a penalty even though the articles thus proceeded against are ships, appurtenances thereof, or cargoes. The Statute of 12 Car. II, c. 18 (7 English Statutes at Large) enacted in 1660 provided that all imports to and exports from England and its possessions must be in English ships "under the penalty of the *forfeiture and loss of all the goods and commodities* which shall be imported into or exported out of any the aforesaid places in any other ship or vessel, *as also of the ship or vessel, with all its guns, furniture, tackle, ammunition and apparel;* one third part thereof to his Majesty, his heirs and successors; one third part to the governor of such land, plantation, island or territory where such default shall be committed, in case the said ship or goods be there seized, or otherwise that third part also to his Majesty, his heirs and successors; and the other third part to him or them who shall seize, inform or *sue for the same in any court of record,* by bill, information, plaint or other action, wherein no essoin, protection or wager of law shall be allowed;". (Italics added.) This statute, providing for the institution of forfeiture proceedings in any court of record against ships and cargoes used in violation of the act clearly authorized a remedy by forfeiture in the common law courts. In the case of Roberts *v.* Withered (1696) 5 Mod. 193; 12 Mod. 92; L. Salk 223, it was held that in proceeding to forfeit a ship and cargo under the above act, an action of detinue would properly lie in the court of the King's Bench. "* * * for My Lord Coke (b) was of the opinion, that the bringing a replevin is a claim in law, and that the property is vested thereby in the plaintiff. So by navigating contrary to the act, the property is divested out of the former owners; and by this action now brought, it is vested in the plaintiff, and therefore he may bring detinue for it." This decision was approved in Wilkins *v.* Despard, 5 Durnf. & East's Rep. 112.

Such forfeiture to the State of illegally used articles has continued as an accepted common law procedure. The statute of 13 & 14 Car. II. c. 7, 11, 18, 20 (8 English Statutes at large) provided for the forfeiture in common law courts of various articles used in violation of law, certain types of vessels being included in chapter 11. The Customs Consolidation Act of 1876 (39 & 40 Vict. c. 36) imposes, as part

of the penalty for smuggling, forfeiture to the Crown of the goods smuggled and the *ship, boat,* carriage, or horse used for their conveyance. Chapter 36, par. 218 of the act provides: "All duties, penalties, and forfeitures incurred under or imposed by the Customs Acts * * * may be sued for, prosecuted, determined, and recovered by action, information, or other appropriate proceeding in the *High Court of Justice in England, the superior courts of common law* at Dublin or Edinburgh * * * or by information in the name of some officer of Customs or Excise, before *one or more justice or justices* in the United Kingdom, the Isle of Man, or the Channel Islands * * *." (Italics added.) (See 9 Halsbury's Laws of England 377; Fraizey *v.* Charlton (1920) 1 K. B. 147.) While this statute is of recent origin, it indicates that at the present time in England forfeiture proceedings against vessels and cargo are instituted in common law courts rather than courts of admiralty. (See also Dangerous Drugs Act, 1920, 10 & 11 Geo. 5, c. 46, s. 14 as amended, 1923; 13 & 14 Geo. 5, c. 5, s. 2 (1); 22 Halsbury's laws of England 399).

In the United States the federal government from early times has provided for the forfeiture of certain articles used in violation of law. (See 14 Stat. L. 156; 14 Stat. L. 151, 165; 13 Stat. L. 240; 14 Stat. L. 178; 12 Stat. L. 319; The Sarah, 8 Wheat. 391. See also Internal Revenue Code secs. 3720 et seq., 2154, 2155 et seq.; 26 U. S. C. A. 339, 552, 553; 19 U. S. C. A. 1088.) California has likewise exacted forfeiture of various illegally used articles. (Pen. C. sec. 325 (1872); Health and Safety Code secs. 12304-5 (former Stats. 1887, ch. 95, p. 110); Health and Safety Code sec. 11610.) The early federal statutes required that in the trial of cases involving seizures made on waters navigable by vessels of ten tons burden and upward the court sit as a court of admiralty (See The Sarah, supra; Reynolds *v.* Steamboat Favorite, supra, 193), but the federal cases themselves recognize that such forfeiture proceedings constituted a valid remedy at common law. Thus, in the case of The Palmyra, supra, Mr. Justice Story stated: "It is well known that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown * * * In the contemplation of the common law the offender's right

was not divested until the conviction. But this doctrine never was applied to seizures and forfeitures, created by statute, in rem cognizable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing." (See U. S. *v.* 5 Boxes of Asafoetida, 181 Fed. 561; The Sarah, supra.)

There are cases which state that an in rem action against a vessel is not a common law remedy and is therefore within the exclusive admiralty jurisdiction of the federal courts. (The Moses Taylor, supra; The Ad. Hine *v.* Trevor, 4 Wall. 555; The Glide, 167 U. S. 606; The Belfast, 7 Wall. 624.) These cases, however, were concerned with types of in rem proceedings that were foreign to the common law. They are authority for the rule that a state court can have no jurisdiction over an action in rem against a vessel when such action has no counterpart in the common law courts. (See Knapp-Stout & Co. *v.* McCaffrey, supra.) But these cases are not controlling in circumstances where the common law provided an analogous remedy. As stated by the Supreme Court of Minnesota in Reynolds *v.* Steamboat Favorite, supra: "In England in the court of exchequer, and in the United States in the district courts in seizures made on land for violation of the revenue laws, the proceedings are in rem, according to the course of the common law. Though a proceeding is in rem, it is not necessarily a proceeding or cause in admiralty. The Sarah, 8 Wheat. 391; United States *v.* 422 Casks of Wine, 1 Peters, 547; L. Kent Comm. 374-5-6."

The courts of other jurisdictions with statutes similar in nature to the one now under consideration have enforced such forfeitures under the assumption that they had jurisdiction to do so. (See State *v.* Umaki, 103 Wash. 232; State *v.* Mavrikas, 148 Wash. 651; Sterrett *v.* Gibson, 168 S. W. (Tex. Civ. App.) 16, aff'd 172 S. W. 1198. See also Mirkovich *v.* Milnor, 34 Fed. Supp. 409; Dick *v.* Anderson, 57 Cal. 251.) In the case of The Bessie Mac, 21 Fed. Supp. 220, a federal district court held that forfeiture proceedings under a Washington statute similar in nature to that of California were maritime in nature and should therefore be

brought in a federal court. The court, however, failed to consider whether such proceedings, though maritime, constituted a common law remedy within the saving clause of the Judiciary Act.

It is therefore clear that the forfeiture of illegally used nets authorized by the California statute involves a traditional common law remedy cognizable in the state courts, even though the statute was enacted long subsequent to the Judiciary Act. (Red Cross Line *v.* Atlantic Fruit Co., supra.)

Appellants contend that the petition for forfeiture filed by the Fish and Game Commission did not allege that the purse seine net in question was used for the taking of fish and therefore failed to state a cause of action. The petition stated, however: "That said purse seine net • • • is and was at all times herein mentioned an appliance used for the taking of fish" and "was • • • used in violation of the provisions of Section 842 of the Fish and Game Code of the State of California." This constitutes a sufficient allegation that the net was illegally used to catch fish.

Since the judgment of forfeiture in the instant case pronounced the net in question a public nuisance pursuant to section 845 of the Fish and Game Code which declares any net used in violation of law to be a public nuisance, the action is one to abate a nuisance and therefore within the appellate jurisdiction of the District Courts of Appeal. (Cal. Const. Art. 6, sec. 4 b.) Although the original appeal was improperly transferred to this court by the District Court of Appeal of the Second Appellant District, this court on November 20th, 1939, transferred the cause to the District Court of Appeal of the First Appellate District. The case is now here by virtue of an order granting a hearing after decision by that court. This court therefore has jurisdiction for all purposes. (Cal. Const. Art. 6, sec. 4 c).

The judgment is affirmed.

TRAYNOR, J.

We Concur:

GIBSON, C. J.
CURTIS, J.
CARTER, J.

APPENDIX "B".

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

L. A. No. 16192

E. C. MOORE, I. ZELLERBACH, A. T. JERGENS, as the Fish and Game Commission of the State of California, *Petitioners and Respondents*,

vs.

PURSE SEINE NET, approximately 325 fathoms long, 32 fathoms deep, approximate size of mesh five to eight inches, *Respondent*,

C. J. HENDRY COMPANY, a corporation, and FRANK SEMATOVICH, *Claimants and Appellants.*

In a statutory proceeding, a large purse seine net was adjudged forfeited to the Fish and Game Commission of the State of California because of a use which the court found was unlawful. The appellants were the owners of the net at the time it was seized.

The facts are undisputed, and the only question for decision is whether the court had jurisdiction to entertain the proceeding. The appellants do not challenge the state's power to regulate fishing in its territorial waters, to close certain waters to fishing with nets, and to provide by law for the forfeiture of nets used in violation of its regulations. But they contend that as the present proceeding is one *in rem* against a thing maritime seized in navigable waters, the federal courts have exclusive jurisdiction.

When seized the net was being used by the purse seine fishing boat *Reliance*, on which it belonged in fishing operations. It is conceded that the boat was then within waters in which the taking of fish by net was unlawful.

The Fish and Game Commission filed its petition in the Superior Court reciting these facts and asking for a judgment declaring the net to be a public nuisance, forfeiting it, and ordering its destruction or sale. Upon the filing

of this petition, the court ordered public notice of the time and place of its hearing to be given. On the day fixed, the appellants appeared and filed their claim as owners of the net. The judgment of forfeiture followed.

The principal contention of the appellants is that as the thing seized was part and parcel of a ship, the Superior Court has exercised admiralty jurisdiction in a proceeding *in rem* brought to accomplish a maritime forfeiture of a maritime object in accordance with the conventional procedure of courts of admiralty. This, they say, constitutes an invasion of the exclusive province of the United States courts upon whom admiralty jurisdiction is conferred by the Constitution of the United States and the acts of Congress. In support of the judgment, the respondent insists that as the state may validly legislate to protect fish and game, its courts may enforce the penalties of a statute enacted for that purpose.

In any maritime case there are two fields in which conflict may occur between the laws and judicial proceedings of a state and those of the United States. The first is in the field of substantive law. A state may not constitutionally adopt and enforce laws which materially interfere with the harmony and uniformity of the maritime law in its international and interstate relations, or which contravene a paramount act of Congress. This is not a conflict of jurisdiction and the question concerns only substantive law.

But conflict may occur in another field. As admiralty jurisdiction is vested exclusively in the courts of the United States, no state court may conduct proceedings according to the course of admiralty or administer admiralty remedies. Its proceedings are limited to those cognizable at common law.

In this case the appellants do not claim that there is any conflict between the substantive provisions of the California Fish and Game Code, under which the proceeding was brought, and maritime law. But lack of conflict in this regard is not determinative of the case, for jurisdiction in admiralty depends upon maritime subject-matter and not upon the source or character of the substantive law which is being administered. If the property proceeded against

is a thing maritime and the place of seizure is on navigable waters, the cause is clearly within the maritime jurisdiction, and it is immaterial whether the substantive law which authorizes the forfeiture is a law of the United States or of a state.

Admittedly the net in this case was seized upon navigable waters. The vessel from which it was taken was engaged in fishing, and the net was a part of her equipment. If it was necessary to the ship's enterprise and indispensable for the accomplishment of the objects of the particular voyage, it was, in legal contemplation, a part of the vessel, although it was not required for navigation. (*Turner vs. United States*, 1928 A.M.C. 1089, 27 F. (2d) 134; *Buffalo*, 148 Fed. 331; *Edwin Post*, 11 Fed. 602; *Witch Queen*, 30 Fed. Cas. 396.)

The true criterion by which to determine whether any vessel or its appurtenances is subject to admiralty is the business or employment for which it is intended, or may be used, or in which it is actually engaged, rather than its size, form, capacity or means of propulsion. "If the business or employment of vessels appertain to travel, or trade and commerce on public navigable water, it is sufficient and the jurisdiction attaches." (*General Cass*, 10 Fed. Cas. 169, 170; *E. M. McChesney*, 8 Fed. Cas. 668; *Alabama*, 22 Fed. 449; *City of Pittsburgh*, 45 Fed. 699; *Public Bath No. 13*, 61 Fed. 692; 1 Benedict, *Admiralty*, 5th ed., p. 2.)

A fishing vessel leaves the mainland with her hatches empty and navigates to a place where the fish are abundant. She is then maneuvered so that the net encircles a school of fish. The fish are drawn aboard and transported back to land. This transportation is as essential a part of the fishing business as is the pursing and hauling in of the net and is certainly an activity in aid of trade and commerce. It is an essential step in getting the fish to market. Hence, at the time the net here in controversy was seized, it was a part of the appurtenances of the *Reliance*, or, to use the phraseology of the American admiralty, a part of her "tackle, apparel and furniture". In legal contemplation it was a part of the vessel itself, just as were her engines, her stores and her navigation equipment, and a subject of admiralty jurisdiction.

However, a further question must be answered. Is this proceeding one which may be prosecuted in a state court?

Although by the Constitution of the United States, the jurisdiction of admiralty causes is vested in the federal courts (art. III, sec. 2), by statute there is saved to suitors "the right of a common-law remedy where the common law is competent to give it" (28 Mason's U. S. C., sec. 371). But a decree *in rem* is not a remedy which the common law is competent to give; it is authorized only by the civil law. The Constitution "only saves to suitors 'the right of a common-law remedy, where the common law is competent to give it.' It is not a remedy in the common law courts which is saved, but a common-law remedy. A proceeding *in rem*, as used in the admiralty court, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute." (*Moses Taylor*, 71 U. S. 411.)

This rule was followed and applied in California as early as 1871 (*Crawford vs. The Bark Caroline Reed*, 42 Cal. 469). Later in *Fischer vs. Carey*, 173 Cal. 185, jurisdiction of an action for partition of a vessel was disclaimed, although it was one in equity against a personal defendant. The court pointed out that although the action was personal in form, in substance it was a suit *in rem*, and any decree of the court would act directly upon the vessel by taking it into the custody of the court, through a receiver, and ordering a sale. This was held to be an invasion of the exclusive jurisdiction of the courts of admiralty. To the same effect is the case of *Glide*, 167 U. S. 606, where the court decided that although a state may enact a law providing for a lien against a ship, it may only be enforced in a federal court of admiralty. And in a more recent consideration of the rule as it applies to facts substantially identical with those now before the court, the conclusion was reached that a state court has no jurisdiction in a proceeding brought for the forfeiture of a fishing boat for violation of a state law. In that case the facts showed that the boat was seized upon the charge of fishing without a license. The director of fisheries of the State of Washington filed a petition in the

Superior Court of that state praying for the confiscation and forfeiture of her engines, tackle, apparel, furniture, equipment, and seine net. The state court was denied jurisdiction (*Bessie Mac.*, 1938 A. M. C. 77, 21 F. Supp. 220).

The respondent relies on *Smith v. Maryland*, 59 U. S. 71, where, it is true, the court held that a state law did not conflict with the jurisdiction of admiralty. But this case has been overruled by the later decisions which are directly to the contrary. It was pointed out in the *Glide case, supra*, that the question whether a claim of a maritime nature could be enforced in the state courts by process *in rem* under a state statute creating a right in the thing itself was not brought to the court directly until the cases of the *Moses Taylor, supra*, and *Hine vs. Trevor*, 71 U. S. 555. In the first, it was determined that a suit against the vessel or thing is a proceeding *in rem* and is not a remedy afforded by the common law, hence, the admiralty court had exclusive jurisdiction. Later in the same term, the court in *Hine vs. Trevor, supra*, decided that as the vessel was sued in a state court for a tort arising from a collision, the judgment should be reversed and remanded with directions to dismiss for want of jurisdiction. The remedy pursued, said the Court, partook of all the essential features of an admiralty proceeding *in rem* which is in no sense a common-law remedy so as to come within the exemption of the law which "saves to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

For these reasons, the judgment must be reversed with directions to the Superior Court to dismiss the proceeding. As one acknowledged authority upon admiralty law has written, "The right to proceed *in rem* is the distinctive remedy of the admiralty and hence administered exclusively by the United States courts in admiralty: no state can confer jurisdiction upon its courts to proceed *in rem*, nor could Congress give such power to a state, since it would be contrary to the constitutional grant of such power to the Federal Government." (1 Benedict, *Admiralty*, 5th ed., sec. 23.) See, also, *Knapp, Stout & Co. vs.*

McCaffrey, 177 U. S. 638; *Crawford v. Bark Caroline Reed*, *supra*.

It is so ordered.

EDMONDS, J.

We Concur:
GIBSON, C. J.
SHENK, J.
McCOMB, J. pro tem.

APPENDIX "C".

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION TWO.

Civil No. 11319.

Filed Jan. 31, 1940.

E. C. MOORE, I. ZELLERBACH, A. T. JERGINS, as the Fish and Game Commission of the State of California, Petitioners and Respondents,

vs.

PURSE SEINE NET, Approximate Length 325 Fathoms, Approximate Depth 32 Fathoms, Approximate Size of Mesh 5 to 8 Inches, Respondent.

C. J. HENDRY COMPANY, a Corporation, and FRANK SEMATOVICH, Claimants and Appellants.

The petitioners sued to have adjudged forfeited to the State Fish and Game Commission a purse seine net used by the owners unlawfully for fishing in the waters of the state. The petitioners had their judgment.

The single question stated by appellants in their opening brief is whether the state courts have jurisdiction of the proceeding. Asserting that the fishing net was a part of the "apparel and furniture" of a sea going vessel, the appellants advance the argument that the federal courts alone have jurisdiction of such forfeiture proceedings. Section 845 of the State Fish and Game Code provides for

proceedings in the state superior courts leading to the forfeiture, sale or destruction of nets in violation of the terms of the code. No provision is made for such proceedings in the federal courts, hence, the question here is whether the code sections are constitutional. Appellants concede the state's power to regulate and control fishing and to forfeit the net, but they state that the forfeiture is a "cause of admiralty cognizance", and hence, that the state courts have no jurisdiction. The Moses Taylor, 4 Wall. 411, 18 L. Ed. 397, and similar cases are cited holding that maritime contracts and torts are exclusively within maritime jurisdiction. We do not find that any of these cases have any bearing upon the question before us. The controlling authority is Smith *v.* Maryland, 59 U. S. 71, involving a state statute providing for the forfeiture of a scoop or drag used for catching oysters within state waters. The point involved was whether the statute conflicted with the federal jurisdiction in admiralty. At page 76 the court says: "It was also suggested, that it is repugnant to the second section of the third article, which declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. But we consider it to have been settled by this court, in United States *v.* Bevans, 3 Wheat. 386, that this clause in the constitution did not affect the jurisdiction, nor the legislative power of the States, over so much of their territory as lies below high-water mark, save that they parted with the power so to legislate as to conflict with the admiralty jurisdiction or laws of the United States. As this law conflicts neither with the admiralty jurisdiction of any court of the United States conferred by congress, nor with any law of congress whatever, we are of opinion it is not repugnant to this clause of the constitution." To the same effect are Manchester *v.* Massachusetts, 139 U. S. 240, 260; and Miller *v.* McLaughlin, 281 U. S. 261, 74 L. Ed. 840. This language is found on page 264 of the latter decision: "The claim under the 14th Amendment is also groundless. A state may regulate or prohibit fishing within its waters. (Manchester *v.* Massachusetts, 139 U. S. 240, 35 L. Ed. 159, 11 Sup. Ct. Rep. 559 • • • and, for the proper enforcement of such statutes, may prohibit the possession within its borders of the special instru-

ments of violation, regardless of the time of acquisition or the protestations of lawful intentions on the part of a particular possessor." (Citing cases).

The supreme power of the state to regulate and control fishing within its territorial waters cannot be denied. Bayside Fish Flour Company *v.* Gentry, 297 U. S. 422, 80 L. Ed. 772.

For these purposes the state has policing jurisdiction of these waters, and to accomplish the end may enact such reasonable police regulations as it may deem proper. Thus the state may prohibit the use of dynamite or fire arms for taking fish within its waters, and may seize and confiscate such articles if necessary to make its regulations effective. The code sections fixing the procedure for the forfeiture of nets unlawfully used in fishing within its territorial waters are justified upon the accepted doctrine that the power to make regulations includes the power to enforce them. In such legislation there is no conceivable conflict with the admiralty jurisdiction of the United States.

It is argued that the petition is insufficient because it does not specifically allege that the net was used "in taking fish." The charging part of the petition is that it was used "wilfully and unlawfully * * * contrary to the provisions of the existing statutes * * * in violation of the provisions of section 842 of the Fish and Game Code * * *." This is not a criminal proceeding. The pleading meets all the requirements of section 845 of the Fish and Game Code. The petition acquainted the owners with the nature of the proceeding. It also stated the date and place of the alleged violation, the statute claimed to have been violated, and the character of the relief sought, namely, the forfeiture of the net. Such notice was all that the statute required. People *v.* One 1933 Plymouth Sedan, 13 Cal. (2d) 565, 569.

There is no merit in the contention that this court is without jurisdiction to hear the cause. The appeal was taken to the district court of appeal of the second appellate district. That court, deeming that the cause was in equity, transferred it to the supreme court. That court transferred the cause here for determination. The appellant now con-

tends that the cause is not one in equity, that jurisdiction of the appeal lay in the district court of appeal of the second district, and that its transfer by that court to the supreme court was therefore void. Under section 4c of Article VI of the constitution the supreme court has power to transfer any cause "pending" before it, or any cause "pending before a district court of appeal" to any other district court of appeal for hearing and decision. Under section 4a a district court may transfer a cause to the supreme court if the appeal was not taken to the "proper" court. Hence, if the order of transfer from the district court to the supreme court was void because the cause was not in equity, then the order was ineffective and the cause was still "pending" in the district when transferred here by the supreme court. If that transfer was not void, but voidable by error, it has become valid by the lapse of the sixty day period. If the original transfer to the supreme court was valid, then, too, the transfer here from the latter court was in accord with the constitutional provision. Any descriptive matter in the order of transfer is immaterial so long as the cause is identified and the purpose of the order is within the court's jurisdiction.

The judgment is affirmed.

NOURSE, P. J.

We concur:

STURTEVANT, J.

SPENCE, J.

APPENDIX "D".

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES.

No. L. B. C. 7558.

E. C. MOORE, I. ZELLERBACH, A. T. JERGENS, as the Fish and Game Commission of the State of California, *Petitioners*,

vs.

PURSE SEINE NET, approximate length 325 fathoms, approximate depth 32 fathoms, approximate size of mesh 5 to 8 inches, *Respondent*,

C. J. HENDRY COMPANY, a corporation, and FRANK SEMATOVICH, *Claimants*.

On the question of fact raised in this proceeding, I am forced to the conclusion that the net in question was actually used in Fish and Game District 20 in violation of the Fish and Game Code.

After studying the very complete and able briefs filed by claimant, and the cases cited, I am of the opinion that the remedy provided in section 845 of the Fish and Game Code of the state, is not within the exclusive jurisdiction of the Admiralty Court of the United States, and that it is not a void exercise of the legislative power of the state of California.

The authority of the state to make laws regulating and protecting fish within the jurisdictional limits of the state is not questioned, but it is seriously and ably contended that the remedy for enforcing forfeiture of the net used in violation of such police law is within the exclusive jurisdiction of the United States. I cannot agree with such contention.

I cannot see anything more involved here than the right of the state to enforce a violation of its laws by a civil action *in rem*, provided by the legislature. The mere fact that the forfeiture sought to be enforced is directed against an object which might be made the subject of the maritime and

admiralty jurisdiction does not make a statutory cause of action to enforce the provision of the state law, a proceeding in admiralty.

A proceeding *in rem*, and this is clearly that, is not within the exclusive jurisdiction of the admiralty courts, even though in some particulars the machinery used is identical.

Such a remedy did not originate with the admiralty courts, but was adopted from the civil law. It is not a remedy afforded by the common law, but when used to enforce a right not maritime in its nature it is a remedy given by statute. (*The Moses Taylor*, 71 U. S. 411, 431; *The Hine v. Trevor*, 71 U. S. 555, 567.) In my opinion the case of *Smith* v. *Maryland*, 59 U. S. 71, cited by petitioners is applicable and binding here. The laws of Maryland cited there created a remedy against the boat itself, if it was used in violation of the law, and the forfeiture of the boat, under such remedy was held not to conflict with the admiralty jurisdiction of the United States.

I see no merit in the other points raised by claimant. In view of the foregoing, judgment will be given as prayed. Attorney for petitioners will prepare findings.

Dated: August 17, 1936.

HARRY R. ARCHIBALD,
Judge.